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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/962,750	11/03/1997	FREDERICK M. AUSUBEL	00786/263003	9250

21559 7590 01/20/2004

CLARK & ELBING LLP
101 FEDERAL STREET
BOSTON, MA 02110

EXAMINER

SWARTZ, RODNEY P

ART UNIT	PAPER NUMBER
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1645

DATE MAILED: 01/20/2004

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Please find below and/or attached an Office communication concerning this application or proceeding.



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APPLICATION NO./ CONTROL NO.	FILING DATE	FIRST NAMED INVENTOR / PATENT IN REEXAMINATION	ATTORNEY DOCKET NO.
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Commissioner for Patents

Detailed Action

1. The following explanation is in response to the Remand To The Examiner, paper#28, mailed 5November2003.
2. The Board of Patent Appeals and Interferences requested clarification whether or not Appellants' amendment filed 16October2000, paper#20 has been entered.

The record of amendments are as follows:

Amendment A, received 7/99 was entered

Amendment B, received 4/00 was not entered because the proposed amendments constituted new matter issues. Appellants were notified by Advisory Action, paper#18, mailed 30May2000.

Amendment C, received 10/00 was part of a defective Appeal Brief and therefore neither the Appeal Brief nor the proposed amendment was considered. Appellants were notified of the defective Appeal Brief. The proposed amendments to claims 1 and 22 were identical to Amendment B and would not be entered for the identical reasoning, i.e., new matter.

Amendment received with the new, proper Appeal Brief, received 11/02, is identical to above Amendment C, and therefore was not entered for the identical reasoning, i.e., new matter.

3. As stated on page 2 of the Remand to the Examiner, "The record does not make clear whether the examiner has entered Appellant's amendment. On one hand, the examiner did not expressly state that the amendment would be entered, either in the Examiner's Answer or in


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the response to the Reply Brief. This might be taken to mean the amendment was denied entry sub silentio, since an amendment after final rejection is not entered as a matter of right. See 37 CFR §1.116."

4. The examiner confirms the Board's reasoning that the proposed amendments to the claims, which were part of the Appeal Brief, were denied entry sub silentio because of the same recurring new matter issues. The Examiner's Answer is based upon the claim language which was of record with the Advisory Action, paper#18, 5/00.

5. The Examiner wishes to clarify for the Board the passage on page 7 of the Examiner's Answer. This argument was based upon Appellants' arguments concerning the proposed, but never entered, new language. The Examiner did not find it persuasive because the claim language on Appeal is the claim language which was of record with the Advisory Action, paper#18, 5/00. This claim language does not contain the criticality that the pathogenicity is due to common or different virulence factors.

6. Appellant's are hereby notified that the application is being returned to the Board of Patent Appeals and Interferences and that any inquiry concerning this communication or earlier communications from the examiner should be directed to the Board of Patent Appeals and Interferences.


RODNEY P. SWARTZ, PH.D.
PRIMARY EXAMINER
Art Unit 1645

January 13, 2004